NATIONAL LABOR RELATIONS BOARD

CITY COMMUNICATIONS CORP. Respondent & COMMUNICATIONS WORKERS OF AMERICA LOCAL 3010 (UTCPR), Petitioner	Case 12-RC218548

CITY COMM'S PROPOSED RESPONSE BRIEF

To the Honorable David Cohen, Regional Director of the National Labor Relations Board:

Comes now City Communications Corp. (City Comm) and respectfully submits this tendered post-hearing response brief in the above captioned matter.

The purpose of this response is to point out several inaccuracies in the factual background section of the Union's opening brief and to briefly respond to the Union's arguments regarding only four of the ten non-exclusive agency factors discussed in their brief.

I. Inaccuracies in the Union's factual background

Petitioner timidly floats the idea that the installers "must comply with policies," imposed by City Comm, which according to the Union, are incorporated into the Independent Contractor Agreement (UB[1] p. 1). But its only reference to the alleged

[1] UB refers to the Union Brief.

policies is hidden in a footnote, and only refers to annex C of the Independent Contractor Agreement, which does not contain employment policies.[2] Annex C contains penalties that Claro-PRTC may impose on City Comm, *see* e.g. CC Ex. No. 1, pp. 14 & 15 ("PRT may apply…") & Tr.[3] pp. 426-428, which are incorporated into the Independent Agreement, (CC, Exh. 1, p. 2), but have never been enforced upon the installers. *See e.g.* Tr. pp. 175, 187, 188, 191, 376.

The Union seems to imply that the installers are employees because City Comm once advertised that it had "positions available for" installers and that interested individuals may send their resume to jobs@citycommpr.com. Not so. The term "position" is compatible with an independent contractor. *See Legeno v. Douglas Elliman*, LLC, 311 F. App'x 403, 405 (2d Cir. 2009) ("We conclude on these facts that, as a matter of law, the *position* for which Legeno applied was that of an independent contractor. Because an independent contractor *position* is not covered by the ADEA, the district court properly granted summary judgment for Douglas Elliman on this claim") (emphasis added)). So is the word "job" whose meanings include "to assign or give (work, a contract for work, etc.) in separate portions, as among different contractors or workers." *See* http://www.dictionary.com/browse/job. Moreover, another ad contemporaneous with the one referenced by the Union specifically states that City Comm is looking for installers "[b]y contract." CC Ex. No. 14.

[2] Employee policies are usually included in an employee h0andbook and contain key sections such as a company's mission, purpose, and values, holiday arrangements, disciplinary and grievance procedures, discrimination and sexual harassment policies, dress code, progressive disciplinary policy, policies for promotion, transfers, demotions, procedures for on-the job accidents, information about benefits, among other things, none of which are contained in Annex C.

[3] Tr. refers to transcripts and CC refers to City Comm.

Next, the Union says that "City Comm will give an interested individual an application and will interview them" (UB, p. 3), implying that it is a document that installers fill before the interview. The so-called application is the document introduced as City Comm Exhibit No. 16, where the installers provide certain information, mostly "details regarding their payment preferences" "*after* they're accepted in order for [City Comm] to comply with Puerto Rico Government regulations." Tr. p. 87 (emphasis added); *id.* at 338.

Petitioner then says that City Comm has "instructed" installers not to request additional orders if they have not completed those already assigned. UB p. 5 (citing UE[4] nos. 11 & 25). But that is inaccurate. Those emails say that installers should consider fixing problems with previously completed installations before requesting additional orders.[5]

Next, citing only the testimony of Antonio Ramos, the Union says that, "installers are not free to reject orders for no reason at all" (UB, p. 5). But even if it were true that Mr. Ramos never rejected orders, this does not mean that he was not allowed to do so. As discussed in City Comm's opening brief, the evidence firmly establishes that installers are free to reject orders for any reason without any penalty. *See* City Comm Brief pp. 3-4 (citing Tr. 188-190, 194, 356, 404, 648—635). Union witness Oscar Ramírez testified that he has rejected orders despite having the order pending for over 10 days, *id.* at 648—655, because he could not agree on a specific time with the customer, and/or because the customer was "a bit hostile," *id.* at 652, ll. 1-13. Another example is an installer who rejected an order and asked City Comm to stop sending orders because he was going to spend time with his daughter. *Id*. at 190.

[4] UE refers to Union Exhibits.

[5] And there is good reason for this, as explained by Union Witness Antonio Ramos: the system will show City Comm with a significant amount of outstanding orders and therefore Claro will not assign new orders to City Comm, thereby limiting the number of orders available for the installers. *See* Tr. pp. 586-587.

The Union maintains that "installers are forced a Monday through Saturday schedule from 8:00am to 5:00pm." (UB p. 6). That is simply false and it is not supported by the citation provided by the Union. In fact not only City Comm witnesses testified otherwise (*see* Tr. pp. 132, 242, 364-365),[6] but so did Union witness Antonio Ramos, who admitted to working on Sundays. *Id.* at. 597, ll. 23-25.

Petitioner then says that "installers are also required to attend training when a new process is being introduced, for example, as in the introduction of TOA." UB p. 7. But the record citation does not support that statement. At most it supports the proposition that once, when Claro was going to change a software application, City Comm told an installer that he needed to attend *that* particular training that was provided by Claro. Nothing more.

Further, the Union misrepresents that installers "are typically assigned a designated area," (UB, p. 6) where the evidence shows that installers choose the area where they will perform the installations. Tr. pp. 131 & 364.

The Union incorrectly states that "[b]ecause Mr. Velez inspects work and gives guidance, [Antonio] Torres considers him a supervisor." UB p. 7 (Citing Tr. 375). Not only does the record fails to support that Velez was a supervisor under section 2 of the National Labor Relations Act, the record also suggests that Mr. Torres was not even referring to Mr. Velez at all, but to the few times that he has encountered Claro inspectors in the islands of Vieques and Culebra. *Id.* ("I see *them* that way…" Q: "Do you have any

[6] Antonio Torres ("Physically I perform the work on Saturday, between Saturday and Sunday, and on Monday morning, I call Claro so that they will jump the tone for telephone and for internet so that I can then complete the order because there's somebody at the office that needs to jump me the order, and that person is free on Saturdays and Sundays, and I can't complete my order. Many times as well, I have to work from 6 in the evening until 8 because those are the days on which they can receive me for the services because they're working, they have other commitments.")

supervision when you perform all these installations" A: " No. Only Claro when Claro takes their inspectors") (emphasis added)).[7]

That an installer is required to correct defective work without additional pay (UB p. 7) is completely consistent with an independent contractor, who guarantees the quality of the work. It is not much different to the "punch list" required from independent contractors in the construction business and other requirements to receive the retainage.

Regarding the Union's contention that City Comm requires the installers to wear uniform, there is no conflicting testimony as Petitioner indicates. *See* UB p. 8, n. 15. Simply put, that an installer may choose to wear a particular shirt does not mean that City Comm compels him to do so. Even Union Witness, Oscar Ramirez, testified that "[t]here are days on which [he] use[s] [the shirt] and other days when [he] [doesn't]," and he has received no disciplinary action for not wearing a particular shirt (Tr. p. 655). But even if installers were required to wear uniforms (they are not), "a uniform requirement often at least in part 'is intended to ensure customer security rather than to control the [driver].'" *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492, 501 (D.C. Cir. 2009). As Mr. Torres testified, he voluntarily chooses to wear a shirt with Claro's logo (which he paid for), "[p]rimarily for the security that the customer will sense when he sees it." (Tr. p. 360). And "constraints imposed by customer demands and government regulations do not determine the employment relationship." *FedEx I*, 563 F.3d at 501 (citing *C.C. E., Inc. v. N.L.R.B.*, 60 F.3d 855, 859 (D.C. Cir. 1995) ("[W]here a company's control over an aspect of the workers' performance is motivated by a concern for customer service, that control does not suggest an employment relationship.")

[7] Then it makes sense for these inspections to be on site because of the burden of going to Vieques and Culebra for an inspection only to find that the customer is not home and therefore the installation cannot be properly inspected.

Petitioner then brings City Comm's external payroll service agent, Dynamic Payroll Solutions (DPS), into play, disingenuously saying that "DPS calculates [the] same Medicare and Social Security percentage from the of installers and employees" (UB p. 9). Petitioner, however, fails to mention that not all the installers have funds deducted for Medicare and Social Security, but only those who want DPS to process their quarterly tax returns, who must also pay a $10 quarterly fee for this service. *See* Tr. p. 510. The same happens in regards to the AFLAC insurance and the "Fondo Ahorro." Both services are provided by DPS directly to the installers. So Petitioner's contention that "City Comm sponsor[s] a group policy disability insurance policy offered through AFLAC" (UB p. 9) is misleading. The use of the word "sponsored" in Juan Fragoso's testimony, was suggested by opposing counsel, *see* Tr. p. 530, and, in any event, Mr. Fragoso immediately explained that it is an individual policy, where each person pays their own premium, depending on the type of coverage they choose." *Id.* 530-531. Indeed, the policy was offered by Mr. Fragoso's soon-to-be wife at the time, who works for AFLAC. *Id.* at 414 & 515. It is not a "sponsored" policy inasmuch as City Comm does not pay anything for coverage.

According to the Union, "DPS took out a 'global' workers compensation insurance policy to cover both City Comm installers and employees." UB p. 9 (citing Tr. pp. 523 & 549). Not so. To start, City Comm's president, Mr. Rey Figueroa, unequivocally declared that, DPS obtained a policy "[f]or the benefit of the contractors of City Comm," (Tr. pp. 17-20) and that City Comm's employees are not covered by the same policy as the independent contractors. *Id*. at 105, ll. 12-16. Inasmuch as the Union points to Mr. Fragoso's testimony to suggest otherwise, the contention does not passe muster. It suffices to say that when Mr. Fragoso requested a policy to the State Insurance Fund, he requested a policy only for the installers. *See id.* at Tr. 554. Moreover, the policy certification itself clearly states that it "covers the following risks: 7600-330 PHONES AND

WIRELESS STAT[IONS]," CC Ex. 21, a classification that, according to the State Insurance Fund, excludes "office employees and telephone operators," who "are classified under the key 8901."[8] And again, since under Puerto Rico law, City Comm would not be immune from suit if an independent contractor fails to obtain worker's compensation insurance for himself, *see* PR Laws Ann. tit. 21, §§ 20 & 21, by obtaining such a policy, it could be said that City Comm is merely complying with government regulations, and this does not determine "the employment relationship." *FedEx I*, 563 F.3d at 501.

The Union then takes issue with the fact that there are some reporting requirements. (UB p. 10). But it is unreasonable for a corporation not to require its independent contractor to report, in some form or another, when it has completed a job—it is expected. Petitioner says that the approval form submitted by the installers contains a "detailed report." City Comm disagrees with the Union's characterization of the 1-page and easy to fill form submitted as Union Exhibit No. 23. Indeed, no installer has complained that this simple form is complicated or burdensome to fill. It is just like a receipt.

Another inaccuracy is the Union's contention that Claro "emphasized that installers *had to* verify that a customer was navigating the internet before completing an order." UB, p. 10 (citing UE 12) (emphasis added). The sender of the email, Ms. Malaret, testified that installers were provided with an *alternative* for completing an order and reducing the number of "no proceeds." *See* Tr. 326-327. Many of the installers "do it and many don't," and there have been no [repercussions] for those who don't." *Id.* at 347 ll. 18-20. Certainly, the email does not say that *all* orders *must* be completed that way. *Id.* at 350-351.

[8] http://web.fondopr.com/sites/default/files/manual_tabloide_2017-2018_005.pdf. (Translation ours).

Finally, the Union implies that City Comm has a "code of conduct" because it terminated the contract of two installers: One after the installer acted disrespectfully and another after the installer breached explicit provisions of the Independent Contractor Agreement. But the truth is that installers are not required to abide by any "code of conduct," and the right to terminate an independent contractor relationship "is inherent in every independent contractor arrangement." *See Minnesota Timberwolves Basketball, Lp & Int'l All. of Theatrical Stage Employees,* 365 NLRB No. 124 (Aug. 18, 2017) (Miscimarra, dissenting); *see also Williams v. Se. Ala. Med. Ctr.*, 2005 WL 1126766, at *3 (M.D. Ala. May 4, 2005) ("Although the contract gives the hospital the right to terminate the contract for Baker's services, that right is not inconsistent with independent contractor status"). This is specially true in Puerto Rico, a jurisdiction where the law compels employers to pay mandatory severance to employees discharged without cause, PR Laws Ann. tit. 29, § 185b, but does not require the same for the unilateral termination of independent contractor agreements, which are presumed valid. *See id.* § 122b.

a. Response to some of the Union's contentions regarding the agency factors

i. The extent of control by City Comm

The Union alleges that the installer's flexibility in scheduling their own appointment is illusory, but it points to no evidence on the record to support this contention. It only mentions City Comm and Claro's weekly schedule. But even Union witness Antonio Ramos admitted that he asked Ms. Malaret to work on Sundays (even though City Comm and Claro are closed on Sundays) and so he did. *See* Tr. 594-595. Antonio Torres testified that he works Saturdays and Sundays, *id.* (364-365); *see also id.* at 132 & 242. Importantly, Ricardo Flores testified that he coordinates the number of orders and his priorities in terms of the jobs he has. *Id.* at 389-390 ("If I have a job that pays on average $58 versus a job that is going to pay me $500, I decide to perform the one for $500 and then leave the others for later.")

Next, pointing to the Installer's Manual provided by Claro, the Union says that "installers have no discretion in the method and manner of how an installation is performed." UB p. 14. It is telling, however, that the Union does not point specific provisions of the manual in its brief. For the most part, the manual, provides *recommendations* on how to perform repair works, *see* UE No. 3, pp. 17-19, describes the equipment to be installed, *id*. at 26-42, provides examples of common mistakes, *id*. at 45, and provides more specific instructions regarding some particular tasks, for which the installers maintain *some* discretion within range. *See e.g.*, *id.* at 25 ("two ways to perform the tests"), 53 (maximum height as possible), 85 ("no less than"), 86 ("minimum"). While it is true that the Manual contains some specific directions regarding the installation of the service, the installers retain significant discretion in their work; not only on the scheduling of appointments, but also regarding the order in which he or she will perform the different components of an installation—the Manual does not say, for example, whether the exterior part of an installation has to be performed before or after the interior part.

Then, the Union points out that installers contact City Comm when they want more orders. (UB, p. 15). This should support a finding of independent contractor status since it demonstrates that they are not mandated to perform a specific number of orders—indeed, they freely may accept or reject an order without repercussion. So is the fact that the assignment of orders to installers depends somewhat on the number of orders that Claro assigns to City Comm. Because City Comm does not have much control over the number of installations, it makes little sense to have permanent "employees" performing installations that may fluctuate in number for factors beyond City Comm's control. Given the nature of the business, it makes particular sense to use independent contractors.

The Union then cites *Adderley Indus., Inc.*, 322 NLRB 1016, 1023 (1997), for the proposition that installers are "employees at will" because City Comm may terminate

their contract anytime. But this is nonsensical since (as explained above), under Puerto Rico law, an employer may be subject to a wrongful termination suit if it discharges an employee without cause. PR Laws Ann. tit. 29, § 185b. Not so when it terminates an independent contractor agreement. *See id.*, § 122b. Moreover, in *Adderley Indus.*, the agreement required "good cause" for its termination, which is consistent with an employment relationship. In that case, the installers were also evaluated, promoted, received bonuses, and when they left voluntarily, the company recorded such action as a "resignation." 322 NLRB at 1023. None of that is present in this case.

ii. The supervision (or lack thereof) of the installers' work.

The Union cannot quarrel with the fact that the installers are not supervised while performing installations, and that any inspection of their work is minimal. Less than 10%—less than Puerto Rico's sales tax. The Union maintains, however, that City Comm supervises installers because it allegedly gives them 24 hours to correct a problem reported by a customer, or two days for a problem discovered during an inspection. (UB, p. 19). In support of this contention, the Union points to Annex C of the Independent Contractor Agreement, which, as explained above, contains penalties that Claro-PRTC may impose on City Comm, *see e.g.* CC Ex. No. 1, pp. 14 & 15 ("PRT may apply…") & (Tr. pp. 426-428), but which have never been enforced upon the installers. (*See e.g. id.* at 175, 187, 188, 191, 376). The Union also relies on the testimony of Antonio Ramos who, doesn't install for City Comm anymore, could not recall if there was ever an occasion where he wasn't able to make a repair within 24 hours (*id.* at 617), and testified that "it's been like 10 or 15 years since [he hasn't] heard about a fine or a penalty," *id.* at 608—that is, before City Comm began operations.

The Union's next argument regarding this factor illustrates how the *Uno Digital* decision was mistaken. According to the Union, the "degree of supervision is consistent

with a finding of employee status" because the Union "represents employees who perform the same work as the installers in this case. UB p. 20 (citing, *Uno* Digital, 12-RC-159482, p. 17). The proposition that the sole fact that the Union represents installers in other companies—which may exercise a superior degree of control and supervision over the installers than City Comm—may have some bearing in this analysis, is befuddling. It is saying that City Comm may be prejudiced because of how competitors treat their own installers. Certainly, the Union's representation in other companies demonstrates nothing regarding the "degree of supervision" that *City Comm* exercises over its own installers.

iii. The tools and materials used to perform the installations

According to the Union, installers have no discretion of what tools to use and their vehicles are subject to Claro's approval. The Union points to no evidence on record showing that the installers' vehicles are subject to Claro's approval. While it is true that Claro (not City Comm) requires installers to have *some* tools, these are described is general terms and are mostly related to safety. *See e.g.* CC Exh. No. 1, p. 17 ("safety equipment," "safety belt," "Safety Boots," "leather, gloves," "safety goggles," "first aid kit"). Further, installers use other tools not included in the agreement such as screwdrivers and drills. *See* Tr. 371 & 482. As to the installation equipment, this is provided by Claro (not City Comm), free of charge. City Comm "merely acts as a conduit for the installers to obtain the materials. *Carso Construction de Puerto Rico, LLC*, 12-RC-127828 (2014), p. 11. "Simply [that] the materials are housed in [a City Comm] warehouse is inconsequential." *Id*.

iv. The method of payment

Most of the relevant aspects of this factor were discussed in section I above. Only two issues merit further discussion. The first is the Union's contention that the fluctuation in installers' pay "only reflects that some installers maybe more efficient than others. The

other is the Union's argument that using helpers does not significantly increase an installer's pay.

Certainly, some installers, given their skills and experience, may be more efficient than others. But this does not mean that business judgment or financial risk plays no role in their earnings. On the contrary, installers exercise business judgment by scheduling their own appointments, designing their routes, deciding whether to accept or reject a particular order, and choosing whether or not to work with assistants or helpers,[9] among others. Certainly, Ricardo Flores exercises business judgment when scheduling his appointments with City Comm and other contractors. (Tr. *id.* 389-390) ("If I have a job that pays on average $58 versus a job that is going to pay me $500, I decide to perform the one for $500 and then leave the others for later").[10]

The fluctuation in pay also depends on the installer's decision to provide other services, such as, sales of internet and telephone services (where they receive a commission and also get paid for the installation) and working in repairs (through and addendum to the Independent Contractor Agreement, *see e.g.* JE[11] Nos. 5 & 6) after hurricanes Irma and María, for which Mr. Torres received monthly earnings of over

[9] The Union tries to minimize this saying that "the limited evidence shows that this arrangement does not significantly increase an installer's pay." (UB, p. 22). It is unclear what the Union means by this. Mr. Antonio Torres declared that he uses an assistant between three to four days a week, and that this is "absolutely" beneficial for him financially. (Tr. 360-362)(explaining that if he is able to perform 4 orders a day with an assistant, while he would be able to perform 1.5 or 2 without him). And regardless of the actual number of installers who use assistants—City Comm does not know how many do because it does not require installers to reveal this information—if indeed many "choose not to take advantage of this opportunity to increase their income does not mean that they do not have the entrepreneurial potential to do so." *Fed Ex I*, 563 F.3d at 498.

[10] *See also* Joint Stipulation No. 1; Tr. pp. 154-161 (identifying Antonio Vargas, Eugene Ayers, Javier Arystid, Fernando Cruz, Juan Carlos Rivas, Rafael Ramírez, José Santiago, Exenovel Alamo, Andres Concepción, as installers who have provided services to other corporations while also installing for City Comm; *id.* pp. 196 & 393, and CC Ex. No. 10.

[11] JE refers to Joint Exhibit.

$20,000 from December 2017 through February 2018. *See* CC Ex. No. 15. And the fact that installers cannot accept payment from the customer is of no consequence; neither does the contractor of a residential construction project receive payment from the ultimate homeowner or tenant, and yet he remains an independent contractor. But most importantly, the fluctuation in pay depends on the amount of work a given installer is willing to perform in a given period. *See id,* and *compare* the earnings of Mr. Torres with those of Mr. Oscar Ramírez. Recall Mr. Torres' testimony: "I work 7 days because I want -- I like money." Tr. p. 77.

II. Conclusion

For the reasons stated and for those included in its opening brief, City Comm respectfully requests the Regional Director to determine that the installers are independent contractors and, consequently, dismiss the Union's petition for lack of jurisdiction.

I hereby certify that on this same date I sent a copy of this Statement, to attorney Richard Rouco, CWA's legal representative, to his email address, rrouco@qcwdr.com.

Dated: May 21, 2018 Respectfully submitted,

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